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Nos. 07-1059 and 07-1078

FILED
MAR 21 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

- AND -

USEC INC.; AND UNITED STATES ENRICHMENT CORP.,

Petitioners,

v.

EURODIF, S.A., ET AL.,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS EURODIF, S.A., AREVA NC, AND AREVA NC, INC.

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QUESTION PRESENTED

Did the court of appeals correctly hold that sales of uranium enrichment services are not sales of "merchandise" within the meaning of the antidumping statute, 19 U.S.C. § 1673?

CORPORATE DISCLOSURE STATEMENT

This petition is being filed on behalf of Eurodif, S.A., AREVA NC (formerly named Compagnie Générale Des Matières Nucléaires), and AREVA NC, Inc. (formerly named COGEMA, Inc.).

The majority equity interest in Eurodif, S.A. is held by AREVA NC, which wholly owns AREVA NC, Inc. AREVA NC is a subsidiary of AREVA, a French corporation.

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Eurodif, S.A., Areva NC, and Areva NC Inc. (collectively, "Eurodif") respectfully submit this brief in opposition to the petitions for certiorari submitted by USEC Inc., the United States Enrichment Corporation (collectively, "USEC"), and the United States.

STATEMENT OF THE CASE

1. Eurodif, a French company, enriches uranium for use by electrical utilities. Enrichment of uranium is an intermediate step in the manufacture of uranium fuel rods, which are used in nuclear power facilities to generate electricity.

Before it can be enriched, uranium ore must be mined and purified into U_3O_8 ("yellowcake"), and then converted into UF_6 ("feed"). Feed uranium has a .711% concentration, or "assay," of the fissionable U_{235} isotope. To make the uranium suitable for use as fuel in a nuclear reactor, it must be enriched until the U_{235} assay reaches a level of 3% to 5%. *See* Gov't Pet. App. 182a.

Uranium enrichment involves separating the feed into two distinct portions: one portion, the low enriched uranium ("LEU"), contains a higher U_{235} assay than the feed; the second, leftover portion ("tails") has a lower assay, typically from .2% to .4%. Nothing is added to feed uranium during the enrichment process; rather, the feed is continuously separated so as to concentrate more of the existing U_{235} in one portion until the desired product and tails assays are achieved. After enrichment, the LEU is delivered to a fabricator, which processes and presses it into pellets that are assembled into fuel rods for use in nuclear reactors. *See* Gov't Pet. App. 182a.

The amount of effort used to separate feed uranium into LEU is measured in "separative work units," or "SWUs." *See* Gov't Pet. App. 183a. As a U.S. Department of Energy regulation observes, SWUs are "the common measure by which uranium enrichment services are sold." 10 C.F.R. § 766.3 (2008). The dispositive question in this case is whether an enricher's sale of SWUs is a sale of services, as the Federal Circuit held, or a sale of merchandise, as petitioners urge.

2. Contracts for the sale of uranium enrichment services are known as "SWU contracts." Under such agreements, utilities supply feed uranium to enrichers and purchase enrichment services, measured in SWUs. Contrary to the Government's suggestion, Gov't Pet. 7, SWU contracts nowhere specify the precise amount of LEU to be delivered. Rather, enrichers' LEU deliveries under SWU contracts depend on the quantity of feed provided by the utility customer and the product and tails assays that the utility specifies. The utility is charged only for the SWUs required for the enrichment. *See* Gov't Pet. App. 183a.

Occasionally, utilities purchase LEU, rather than SWUs, from enrichers. These transactions for enriched uranium product ("EUP") differ from SWU transactions in a fundamental respect: Unlike with SWU contracts, utilities entering into EUP contracts do not commit to provide the feed uranium to the enricher. Thus, under an EUP contract, the enricher, not the utility, is responsible for procuring the uranium, which it then processes into LEU at the desired assay. There is no dispute that a sale pursuant to an EUP contract is a sale of merchandise, *i.e.*, LEU, and thus could potentially

trigger duties under the antidumping statute, 19 U.S.C. § 1673. *See* Gov't Pet. App. 182a-83a.

The price terms in EUP and SWU contracts reflect this essential difference between the two types of agreements. The price paid by a utility in an EUP contract covers not only the value of enrichment (*i.e.*, the value of SWUs), but also the value of the feed uranium supplied by the enricher. *See* Gov't Pet. App. 182a. In a SWU contract, by contrast, the cost or value of uranium plays no part in the price paid by a utility, which price covers exclusively the value of SWUs. *See* Gov't Pet. App. 47a; Gov't Pet. App. 204a-05a. Thus, two utilities that receive the same amount of LEU at the same U_{235} assay, one pursuant to an EUP contract and the other pursuant to a SWU contract, would pay substantially different prices, because those two utilities would be buying different things: One would be buying all of the components of the LEU's value, including the associated uranium itself; the other would be buying only the service of enrichment of its uranium.[1]

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[1] EUP contracts and SWU contracts allocate the significant risk of uranium price fluctuations differently as between utilities and enrichers. In an EUP contract, the enricher bears the risk of price fluctuations, since it must procure the feed uranium and then provide LEU to the utility at an agreed upon price. In a SWU contract, the risk is borne by the utility, since it is responsible for supplying feed uranium to the enricher. The allocation of such risks is an important aspect of any contract involving uranium products, because uranium prices can swing dramatically. For example, between January 2000 and 2007, feed prices rose from under $10/lb. to more than $130/lb., before falling again to less than $80/lb. *See* Ux Current and Historical Price Indicators, *available at* http://www.uxc.com.

3. In December 2000, USEC filed an antidumping duty petition with the Department of Commerce ("Commerce") regarding LEU imported from France. The petition purported to cover transactions pursuant to both EUP contracts and SWU contracts. Eurodif opposed the petition insofar as it covered SWU transactions, on the basis that Commerce could not impose dumping duties on the sale of enrichment services, since the antidumping statute, 19 U.S.C. § 1673, applies only to sales of merchandise.

Relying on both EUP and SWU contracts, Commerce determined that LEU "from France is being sold, or is likely to be sold, in the United States at less than fair value." Gov't Pet. App. 221a. Commerce rejected Eurodif's argument that SWU transactions are sales of services outside the reach of the antidumping law, finding that "trade in goods" occurs "regardless of whether the sale is structured as one of enrichment processing or LEU." Gov't Pet. App. 231a.

Eurodif appealed to the Court of International Trade ("CIT"), which held that "Commerce's decision to treat [SWU] contracts as contracts for sales of a good is neither supported by substantial evidence nor in accordance with law." Gov't Pet. App. 207a. The CIT noted that under Commerce's previous decisions, a subcontractor or "toller" that sells less than the full value of an article, as in a SWU contract, has been treated "as a service provider and not the producer of the good." Gov't Pet. App. 192a. Rejecting "Commerce's claim that the sole difference between [EUP contracts and SWU contracts] is the way such transactions are structured,"

the CIT pointed to "a critical difference between the two transactions: what is purchased." Gov't Pet. App. at 204a. In EUP contracts, the full value of the LEU is purchased, whereas only "enrichment services" are purchased in SWU contracts. Gov't Pet. App. at 204a-05a.

On remand, Commerce adhered to its original determination. *See* Gov't Pet. App. 69a-177a. Eurodif contested the remand determination and the CIT reversed, again holding that Commerce's conclusions "that [EUP contracts] and SWU contracts are equivalent and that the antidumping provisions are applicable to SWU transactions are neither supported by substantial evidence nor in accordance with law." Gov't Pet. App. 67a.

On interlocutory appeal ("*Eurodif I*"), the Federal Circuit affirmed, holding that "the SWU contracts at issue in this case were contracts for the provision of services and not for the sale of goods." Gov't Pet. App. 24a. Rejecting the Government's and USEC's argument that a sale of merchandise occurs because title to the finished LEU is transferred, the court found that "the SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." Gov't Pet. App. 20a. The court further determined that "nothing in the text of the antidumping statute or its legislative history evidences . . . a Congressional intent to re-characterize contracts like the SWU contracts at issue in this case for the purposes of antidumping investigations." *See* Gov't Pet. App. 23a. The Federal Circuit also noted its earlier decision in *Florida Power*, in which the Government had

successfully argued that SWU contracts are service transactions. After explaining that "*Florida Power* is not binding precedent for this case," the court found "its reasoning and its conclusion persuasive." Gov't Pet. App. 21a.

While the Government's and USEC's rehearing petitions were pending, this Court issued its decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), which held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. At petitioners' request, the Federal Circuit granted rehearing for the sole purpose of addressing the impact of *Brand X*, and in all other respects affirmed its prior decision. *See* Gov't Pet. App. 30a.

In its decision on rehearing ("*Eurodif II*"), the court again held that SWU contracts are not subject to the antidumping statute. It expressly found that "the antidumping duty statute unambiguously applies to the sale of goods and not services." Gov't Pet. App. 33a. Pointing to the "inescapable conclusion . . . that the enrichers do not 'sell' LEU to utilities pursuant to . . . SWU contracts," the court "reject[ed] Commerce's application of the antidumping duty statute to the SWU contracts." Gov't Pet. App. 33a-34a.

The CIT then remanded to Commerce, with instructions to "explain how its final determination and order on remand has eliminated all SWU transactions,"

as required by *Eurodif I* and *Eurodif II*. Despite the CIT's instruction, Commerce determined that it would not modify the antidumping duty order to exclude future SWU transactions from its scope. Accordingly, the CIT again remanded to Commerce, stating that *Eurodif I* and *II* required that the scope of the order be redrawn. This time, Commerce issued a conforming antidumping order, which the CIT sustained. Gov't Pet. App. 2a-3a.

USEC and the Government appealed to the Federal Circuit regarding the scope of the revised antidumping order. The Federal Circuit dismissed the appeal as unripe. Gov't Pet. App. 1a-7a. These certiorari petitions followed.

REASONS FOR DENYING THE PETITIONS

Between them, petitioners raise three arguments in support of a writ of certiorari: (1) the Federal Circuit erred by misapplying the settled rules of agency deference established in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) and *Brand X*; (2) the decision below creates a loophole in the antidumping law that other industries could exploit to evade dumping duties; and (3) the decision below will have undesirable consequences for foreign policy and national security. None of these contentions is supportable, and even if they were, none warrants a grant of certiorari.

First, the claim that the Federal Circuit misapplied *Chevron* and *Brand X* is nothing more than a request for error correction. Moreover, the decision below was correct on the merits. The antidumping statute unambiguously applies only to sales of merchandise.

SWU transactions are sales of services, not merchandise, because only the service of enrichment, not the LEU itself, is sold. Thus, the court of appeals correctly held that SWU contracts are not subject to the antidumping law.

Second, the decision below did not create a loophole in the antidumping statute. The decision precludes the imposition of dumping duties only where there is never a sale of subject merchandise in the United States — a situation unique to the facts of this case. In all other situations, Commerce's "tolling" regulation, 19 C.F.R. § 351.401(h), provides a means for imposing any applicable dumping duties. Under that authority, which is unaffected by the Federal Circuit's decision, the antidumping law is applied to the downstream domestic sale of imported goods that have been improved by a foreign subcontractor. *See* Gov't Pet. App. 188a-207a. There is no downstream sale in this case because the imported material (LEU) is consumed — *i.e.*, used as fuel in a nuclear reactor — without ever being sold. Petitioners have pointed to no instance in which this critical factor (consumption without sale) has been presented before or since in other transactions that have come before Commerce. Thus, petitioners' claim that other industries could structure their contracts like SWU contracts to avoid dumping duties is unsupported: Any applicable dumping duties would be triggered by the first domestic sale of the subject goods.

Third, petitioners' arguments that the decision below could undermine the highly enriched uranium

("HEU") agreement[2] between the United States and Russia and other policy objectives should be directed not to this Court, but to Congress and the President. Indeed, Congress is already considering legislation that would dispose of the precise question raised in this case. *See* Gov't Pet. 26. n.4. In any event, the United States has ample authority under existing law to deal with petitioners' expressed concerns regarding Russian LEU imports, without resorting to the antidumping statute.

I. PETITIONERS' CLAIM THAT THE COURT OF APPEALS MISAPPLIED *CHEVRON* AND *BRAND X* IS NOT CERTWORTHY, AND, REGARDLESS, THE DECISION BELOW WAS CORRECT ON THE MERITS

The Government asks this Court to grant a writ of certiorari because the court below purportedly misapplied the *Chevron* doctrine when it declined to defer to Commerce's determination that SWU contracts are subject to the antidumping law. *See* Gov't Pet. 17. USEC concurs, and further argues — without the support of the Government — that the Federal Circuit misapplied *Brand X* by ostensibly relying on *Florida Power*, an earlier decision also concluding that SWU contracts involve sales of services. USEC Pet. 31.

There is no dispute that the Federal Circuit explicitly considered both *Chevron* and *Brand X* and properly stated the applicable rules of law. Shortly after this Court

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[2] *See* Agreement Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, U.S.-Russ., Feb 18, 1993, State Dep't No. 93-59, 1993 WL 152921.

issued *Brand X*, the Federal Circuit granted rehearing for the express "purpose of addressing the applicability of" that decision. Gov't Pet. App. 30a. The court held that neither *Chevron* or *Brand X* required judicial deference to Commerce's determination. *See* Gov't Pet. App. 26a ("to the extent the government argues that Commerce is owed deference under *Chevron* . . . , we reject that argument because we find that the plain meaning of the statute is unambiguous"); Gov't Pet. App. 34a ("We conclude that our analysis in this case is consistent with the Supreme Court's holding in [*Brand X*].").

Petitioners point to no issue regarding the law governing deference to agency decision-making that has divided the courts of appeals and needs this Court's review to ensure uniformity of federal law. Even if the court below had misapplied the relevant precedent, such a request for error correction would not be a sufficient ground for a writ of certiorari. *See* Sup. Ct. R. 10.

In any event, the decision below was correct. As the Federal Circuit recognized, "the antidumping duty statute unambiguously applies to the sale of goods and not services." Gov't Pet. App. 33a. The only thing sold in a SWU transaction is SWUs — a measure of the effort expended to enrich uranium. The associated uranium itself — the only "merchandise" involved in the transaction — is *supplied by* the utility; it is not *sold to* the utility. Accordingly, the price term in a SWU contract does not cover the value of uranium; instead, it covers

only SWUs, and is determined on a per-SWU basis. *See* Gov't Pet. App. 204a-05a.

Not surprisingly, the other courts to have considered the question have likewise concluded — with the support of the Government — that SWU contracts are contracts for services, not goods. *See Florida Power*, 307 F.3d at 1371-74; *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 705 (1996), *aff'd* 121 F.3d 1475 (Fed. Cir. 1997); *Centerior Serv. Co. v. United States*, No. 95-103c, 1997 U.S. Claims LEXIS 323, at *19 (Fed. Cl. Dec. 29, 1997).[3]

In *Barseback*, the United States successfully maintained on behalf of USEC, which was then government-owned, that the Uniform Commercial Code ("UCC") does not apply to SWU contracts because no sale of goods is involved. *See* 36 Fed. Cl. at 705 ("It is clear . . . that the customers are contracting for services, not goods, from USEC."). Likewise, in *Centerior Service*, the court agreed with the United States that the UCC does not apply to SWU contracts because they "are for uranium enrichment services." 1997 U.S. Claims LEXIS 323, at *19. And in *Florida Power*, the United States successfully argued that SWU transactions are sales of services, and thus not subject to the Contract Disputes Act of 1978, 41 U.S.C. § 602(a). *See* 307 F.3d at 1372.

Advocating the opposite position here, petitioners contend that SWU contracts actually involve sales of

[3] In *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663 (1988), this Court stated that "Congress . . . authorize[d] the AEC to offer *'toll enrichment' services* whereby utilities could obtain unenriched uranium on the open market and have it enriched by the AEC for a fee." *Id.* at 665 (emphasis added).

LEU, just like EUP contracts. They principally rely on two features of a SWU transaction: (1) that the LEU delivered to a utility customer may not have been processed from the same feed material that the utility provided to the enricher; and (2) that upon delivery, title to the LEU is transferred to the utility. *See* Gov't Pet. 19-23; USEC Pet. 26-27.

Neither of these factors can convert a sale of enrichment services into a sale of merchandise. First, all feed uranium has a .711% U_{235} assay, so "the specific feed uranium provided by a utility customer need not be used to produce LEU for that customer." Gov't Pet. App. 184a. But the fungible nature of feed uranium does not change the essential elements of a SWU transaction, including, most importantly, *what* is sold in such transactions: Utility customers provide the raw materials to be enriched, purchase and pay for only the service of enrichment, and receive LEU. The sale is only of the service of enrichment, regardless of whether the same uranium is returned to the utility.

Second, as the Federal Circuit held after reviewing the contracts at issue here, "ownership of either the unenriched uranium or the LEU is not meant to be vested in the enricher during the relevant time periods." Gov't Pet. App. 20a. Rather, the utility retains "title, risk of loss, [and] power to alienate or sell" the feed that it provides. Gov't Pet. App. 184a. Once the enrichment process is complete and the LEU is delivered, the utility holds title to the LEU but no longer keeps title to the associated unenriched feed uranium. This ensures that the utility does not at any one time have title to both

LEU and, separately, the feed that it supplied. The substance of the transaction is plain: the only thing sold to the utility is the enrichment of uranium, not uranium itself.[4]

USEC further contends that the definition of "services" in an entirely different statute, dealing not with import restrictions but with trade negotiations, supports petitioners' view that SWU transactions are sales of merchandise under the antidumping law. *See* USEC Pet. 27-28 (discussing 19 U.S.C. § 2114b). According to USEC, "services" is defined in that provision to include only "traditional services [such] as banking, insurance, and advertising, but . . . not . . . manufacturing or processing." USEC Pet. at 28. The language of the provision itself, however, does not support USEC's interpretation. *See* 19 U.S.C. § 2114b(5) ("'service' . . . includes, but is not limited to, banking, insurance, . . . *construction*") (emphasis added). Moreover, the United States itself has proposed including "services incidental to manufacturing" within the scope of the negotiations on "energy services" in the

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[4] To the extent the Government suggests that a utility's provision of feed uranium to an enricher constitutes consideration for LEU, *see* Gov't Pet. 19-20, it should be noted that Commerce itself recognized the infirmity of this position in its initial dumping determination, *see* Gov't Pet. App. 254a, and that USEC treats feed uranium provided by a utility as the utility's property. *See* Gov't Pet. App. 185a-86a n.5. "The feed uranium does not become an asset of the enricher, nor is it ever reflected as such on the enricher's books and records." Gov't Pet. App. 185a. As the CIT correctly found, "the provision of feed uranium is not treated by the parties as a payment in kind, but the provision of specific material, owned by the customer, to be enriched." Gov't Pet. App. 198a.

World Trade Organization's General Agreement on Trade in Services. *See* Communication from the United States to the Council on Trade in Services, S/CSS/W.24 (Dec. 18 2000), *available at* http://docsonline.wto.org (search doc. no. 00-5556).[5]

Petitioners also argue that because the term "sale" has been broadly construed in other, unrelated statutes, it ought to be given an elastic interpretation in the antidumping law, so as to encompass SWU transactions. Gov't Pet. 24; USEC Pet. 23-27. But as the Federal Circuit previously held when determining that the provision of free samples is not a sale for purposes of the antidumping law, "Congress intended to give the term ['sold'] its ordinary meaning." *NSK Ltd. v. United States*, 115 F.3d 965, 974 (Fed. Cir. 1997).

Moreover, the critical question here is not *whether* there was a sale, but rather *what* was sold. The answer is uranium enrichment, which is a service and not merchandise. This conclusion is confirmed by Commerce's tolling regulation, 19 C.F.R. § 351.401(h), and the agency's own interpretation of the antidumping statute (until this case). *See* Gov't Pet. App. 201a ("if the text of 19 C.F.R. § 351.401(h) and Commerce's prior decisions were applied to the evidence on this record, the SWU contracts would be treated as contracts for the performance of services"). On numerous prior occasions, Commerce has considered tolling arrangements, under which one company provides materials to another for

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[5] *See* Communication from the United States to the Council on Trade in Services, S/CSS/W.24 (Dec. 18 2000), *available at* http://docsonline.wto.org (search doc. no. 00-5556).

processing. The tolling regulation and related decisions establish that "where the price paid for subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law." Gov't Pet. App. 205a-06a. In other words, only a sale reflecting the full value of the merchandise, not the sale of a tolling service applied to that merchandise, can give rise to a dumping analysis. As Commerce itself put it, unless a subcontractor is paid for "the entire value of the subject merchandise," Commerce "do[es] not consider the 'sale' between the subcontractor and . . . contractor to be a sale of subject merchandise at all. . . . It is the contractor's subsequent sale which is the relevant sale because that party owns the merchandise in its entirety . . . ." Gov't Pet. App. 193a-94a.

Finally, petitioners assert that enrichment is a "major manufacturing process" that "adds substantial value" to feed uranium and creates a "new" or "substantially transformed" article in commerce. Gov't Pet. 18; USEC Pet. 26. The same could be said of virtually any tolling arrangement.[6] But the sale of this "manufacturing process" is not a sale of merchandise. The *output* of the enrichment process — whether substantially more valuable or not — is not dispositive

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[6] As the CIT observed, "in earlier cases involving tolling, it has . . . been the toller that created the 'essential character' of the finished good by transforming the raw materials or inputs into the subject merchandise." Gov't Pet. App. 201a. Yet, in those cases, Commerce has treated the toller as a service provider and not a producer of goods for purposes of a dumping analysis. *See* Gov't Pet. App. 201a-202a.

here because that output is not sold in a SWU transaction. Rather, what is sold is the application of a process (enrichment) to raw materials (feed) that the customer provides. That process is a service, not a good, regardless of whether it adds value to or substantially transforms the feed material.

II. Petitioners Have Not Demonstrated that the Decision Below Will Have any Effect Outside the Unique Context of SWU Contracts

Petitioners ask this Court to review the decision below because it purportedly creates a "potentially gaping loophole" in the antidumping law that other industries could exploit to evade dumping duties. Gov't Pet. 16, 25; *see also* USEC Pet. 32. Even if this Court were to consider departing from its typical practice of waiting to see if "potential" problems in fact materialize before granting certiorari to address them, there is no reason to do so here. The unique nature of SWU transactions and Commerce's consistent application of the antidumping law to sales of merchandise manufactured through tolling arrangements make it all but impossible for the decision below to have such broad ramifications.

SWU transactions are *sui generis* because the imported material (LEU) is consumed in a nuclear reactor, and thus no sale in the United States occurs. Because consumption without sale is not present in other types of transactions, the Federal Circuit's rulings would not shield them from dumping duties. Rather, as noted, under the tolling regulation and related decisions, which are not affected by the decision below, the first

downstream domestic sale of the imported materials, or an article in which those materials were incorporated, would trigger applicable dumping duties.

Thus, the Government is incorrect when it states that if the Federal Circuit's decision is left intact, other industries could readily circumvent the antidumping statute "by supplying iron ore for 'smelting and rolling services'; . . . trees for 'harvesting and milling services'; and . . . silicon for 'processing services.'" Gov't Pet. 25. As soon as the resulting steel, lumber, or semiconductors were sold in the United States, dumping duties could be assessed. *See, e.g., Stainless Steel Wire Rod from Sweden*, 63 Fed. Reg. 40,449 (Dep't of Commerce July 29, 1998) (notice of final determ.) (downstream sale of article, not manufacturing article under tolling arrangement, triggers dumping analysis); *DRAMS from Taiwan*, 64 Fed. Reg. 56,308 (Dep't of Commerce Oct. 19, 1999) (notice of final determ.) (same).[7]

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[7] The tolling regulation and related decisions likewise refute the identical loophole argument made by the Committee to Support U.S. Trade Law's ("CSUSTL") in its *amicus* brief. Without ever acknowledging the preexisting law applying the antidumping statute to sales of merchandise manufactured through tolling arrangements, CSUSTL asserts that the decision below would leave U.S. industries vulnerable to dumped imports of steel, pasta, semiconductors, and other goods, if the relevant contracts were "structured" like SWU contracts. CSUSTL Br. at 8-9. But once any of those materials were sold in the United States, dumping duties could be imposed. *See* Gov't Pet. App. 190a-201a. Indeed, Commerce has already applied the antidumping law to downstream domestic sales of steel, pasta, semiconductors, and other products manufactured by foreign tollers. *See Stainless Steel Wire Rod from Sweden, supra*; *Pasta from Italy*, 63 Fed. Reg. 53,641 (Dep't of Commerce Oct 6, 1998) (Prelim. Results); *DRAMS from Taiwan, supra*.

Petitioners have pointed to no other situation in the five years since the Court of International Trade's decision in this case, and three years since the Federal Circuit's decision — and none in the history of the antidumping law — in which dumping duties were precluded because imported materials were consumed without being sold in the United States. In short, the threatened loophole problem has never materialized and there is no basis for concluding it ever will.

III. Petitioners' Policy Arguments Are Not Properly Directed to This Court and, In Any Event, Are Unpersuasive

A. The Nation's Foreign Policy and Security Interests Are Matters for Congress and the President

Petitioners argue that a writ of certiorari should be granted because the decision below ostensibly "threatens to undermine U.S. foreign policy and national security interests" relating to nuclear materials. Gov't Pet. 26; USEC Pet. 32. In particular, petitioners contend that the decision below "threatens the effectiveness of the HEU Agreement" with Russia. Gov't Pet. 28. According to petitioners, the decision gives Russia an incentive to export commercially produced LEU pursuant to SWU contracts, rather than exporting LEU that has been downblended from HEU pursuant to the HEU Agreement. Gov't Pet. 26-30; USEC Pet. 33-35. The Government further states that "[i]f Russia enjoys unfettered access to the market for LEU in the United States," then the U.S. uranium enrichment industry could be weakened, "leav[ing] the Russian Federation

as the predominant supplier of enriched uranium," and "increas[ing] the United States' dependence on foreign energy sources." Gov't Pet. at 31. Additionally, both petitioners argue that the decision below will undermine USEC's financial viability, which they claim is significant because USEC's plants purportedly "employ the only uranium enrichment technologies available to meet U.S. defense needs." USEC Pet. 36; Gov't Pet. 30-31.

Petitioners' policy arguments are not persuasive, *see infra* Point III.B., but whatever their merits, Congress and the Executive, not this Court, are the proper bodies to consider them. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2420 (2007) (whether a statute's "undesirable consequences" warrant a change in law "is a policy debate that belongs in the halls of Congress, not in the hearing room of this Court").

And, indeed, Congress is already considering legislation that would make SWU transactions subject to the antidumping law. *See* H.R. 4929, 110th Cong. (2007); S. 2531, 110th Cong. (2007). USEC's certiorari petition never acknowledges this pending legislation, although USEC is actively lobbying for its enactment. The Government's petition acknowledges the legislation, but observes that "[t]here is no guarantee . . . that [it] will be enacted, much less that it will be enacted in its present form." Gov't Pet. 26 n.4. But uncertainty about whether Congress will act is not a ground for this Court to take on policy-making responsibilities that are properly reserved for the political branches of government.

B. Petitioners Have Not Established that the Decision Below Compromises the Nation's Foreign Policy or Security Interests

Petitioners' policy arguments fail to establish that the decision below threatens the nation's foreign policy or security interests. Petitioners suggest that the antidumping statute is the only meaningful mechanism for restricting Russian LEU imports. *See* Gov't Pet. 29 ("successful implementation of the HEU Agreement depends in significant part on the government's ability to use the antidumping laws to regulate the entry of LEU"); USEC Pet. 35 ("unless the *Eurodif* loophole is closed Russia will be able to export unlimited quantities of LEU pursuant to SWU transactions"). But that suggestion is wrong. The United States possesses ample authority under existing law to limit or prevent Russian imports of LEU apart from the antidumping statute.

For example, the President has authority to prohibit or restrict such imports under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701 et seq. IEEPA authorizes the President "to deal with" threats "to the national security, foreign policy, or economy of the United States" that originate abroad. 50 U.S.C. § 1701(a) (2000). Where such a threat exists, the President may "regulate, . . . prevent or prohibit, any . . . importation or exportation of . . . any property in which" a foreign national or country has an interest. 50 U.S.C. § 1702(a)(1)(B). President Clinton issued an executive order pursuant to IEEPA in order to ensure "the full implementation of the [HEU] Agreement." *See* Exec. Order No. 13,159, 65 Fed. Reg. 39,279 (June 21, 2000).

That executive order has been renewed each year since it was issued, most recently in June 2007. *See* Notice of President, 72 Fed. Reg. 34,159 (June 19, 2007).

The United States can also restrict Russian LEU imports pursuant to Section 232 of the Trade Expansion Act of 1962, *codified as amended at* 19 U.S.C. § 1862 (2000). That provision directs the Secretary of Commerce to advise the President upon "find[ing] that [any] article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862(b)(3)(A). If the President concurs in that finding, he or she may "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii) (2000).

Also unpersuasive is petitioners' argument that the decision below could impair the nation's energy and security interests by jeopardizing USEC's financial viability. Even assuming that USEC's continued existence is in doubt — a factual assertion not supported by evidence in this record — petitioners have not explained why the United States could not meet its needs for nuclear materials without USEC's assistance.

Both the Government and USEC observe that USEC supplies enriched uranium to the United States for military purposes. Gov't Pet. 30; USEC Pet. 36. But the enrichment plant "operated by USEC" is "owned by the U.S. government." USEC Pet. 6. And until the Government's enrichment operation was privatized,

commercial uranium enrichment in the United States was done by the Department of Energy. *See Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1366 (Fed. Cir. 2002) ("The United States government has long performed uranium enrichment for domestic and foreign utility companies."). Thus, petitioners have not shown why USEC's "continued survival is . . . a matter of compelling importance to U.S. national security interests." Gov't Pet. 30.

Nor have petitioners shown that the Government requires additional LEU to meet its nuclear defense needs. As recently as March 12, 2008, the Secretary of Energy issued a Policy Statement addressing "the management of [its] excess uranium inventory." Secretary of Energy's Policy Statement on Management of Excess Uranium Inventory, at 1, *available at* http://www.ne.doe.gov. The statement explains that the Department of Energy "has a significant inventory of . . . uranium that is excess to U.S. defense needs." *Id.* Accordingly, it plans to dispose of excess uranium through commercial or other transfers, while still "maintain[ing] sufficient uranium inventories at all times to meet the current and reasonably foreseeable needs." *Id.* at 2. Moreover, "[o]ver the coming years, the Department expects to downblend most of its excess HEU into LEU," *id.* at 3, meaning that the United States has a source of LEU apart from uranium enrichment.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for writs of certiorari to review the judgment of the Federal Circuit.

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